

DEC 02 2005

**CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS**

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DAVY LEE WATERS; SANNARAHA
WATERS,

Plaintiffs - Appellants,

V.

ABBIE JOSSIE, in her Official Capacity
as Grants Pass Field Manager within the
Galice Creek Mining District, Oregon,
Bureau of Land Management; T.
REUWSAAT, in his Official Capacity as
Medford District Manager within the
Galice Creek Mining District, Oregon
Bureau of Land Management; ELAINE
MARQUIS BRONG, in her Official
Capacity a State Director of the Bureau of
Land Management within the Galice Creek
Mining District, Oregon Bureau of Land
Management; GALE A. NORTON, in her
Official Capacity as Secretary, United
States Department of Interior,
Administrator of Public Lands within the
Galice Creek Mining District, State of
Oregon,

Defendants - Appellees.

No. 04-36082

D.C. No. CV-03-03073-JPC

MEMORANDUM^{*}

^{*} This disposition is not appropriate for publication and may not be cited
to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

Appeal from the United States District Court
for the District of Oregon
John P. Cooney, Magistrate Judge, Presiding

Argued and Submitted November 17, 2005
Portland, Oregon

Before: KLEINFELD and GRABER, Circuit Judges, and MOSKOWITZ,^{**}
District Judge.

David Lee and Sannaraha Waters appeal from the district court's entry of summary judgment in favor of the Appellees, arguing that the Interior Board of Land Appeals ("IBLA") abused its discretion in determining that their mining claim was null and void due to the lack of discovery of a valuable mineral deposit. We vacate the IBLA's decision and remand for further administrative proceedings.

The IBLA erred in applying the 25% overhead surcharge to the labor rate to determine labor costs. The validity of a claim must be "premised on the objective economics surrounding *the proposed mining venture*." *United States v. Miller*, 138 IBLA 246, 277 (1997) (emphasis added). A proposed mining venture may be a "mom and pop" operation involving no outside employees. *Id.* See also *United States v. Clouser*, 144 IBLA 110 (1998). If a person of ordinary prudence would be justified in mining the claim without outside help, the claim is supported by a

^{**} The Honorable Barry Ted Moskowitz, United States District Judge for the Southern District of California, sitting by designation.

valuable discovery. *See Castle v. Womble*, 19 L.D. 455, 457 (1894). The evaluation of a small claim based on how a “mom and pop” venture would operate does not render the prudent-person test subjective.

At oral argument, counsel for Appellees conceded that it would be appropriate to remand the case for further proceedings before the ALJ if the 25% overhead surcharge was inapplicable. *See United States v. Taylor*, 19 IBLA 9, 24 (1975) (explaining that when a patent applicant overcomes the Government’s prima facie case but there is a lack of evidence on an essential issue that raises a reasonable doubt as to the validity of the claim, the IBLA should remand the case for a further hearing). Accordingly, we remand for further proceedings before the ALJ.

At the prior hearing before the ALJ, neither party presented evidence regarding labor overhead costs that might apply to a “mom and pop” operation – e.g., self-employment taxes and insurance. On remand, both sides can present evidence regarding this issue and any other issue bearing upon discovery. The Government must establish a new prima facie case of invalidity. *Taylor*, 19 IBLA at 27. However, the ultimate burden of proving discovery rests upon the mining claimants. *Id.* at 23.

The IBLA's decision that the Waters' claim is null and void is vacated, and this case is remanded for further proceedings before the ALJ.

VACATED AND REMANDED.